

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

UNITED STATES SURGICAL)
CORPORATION and)
MALLINCKRODT LLC)
)
CONCERNING A CHLOR-ALKALI)
MANUFACTURING FACILITY IN)
ORRINGTON, PENOBSCOT COUNTY,)
MAINE)
)
PROCEEDING UNDER 38 M.R.S.A.)
§ 1365, UNCONTROLLED HAZARDOUS)
SUBSTANCE SITES LAW)

**MALLINCKRODT’S REPLY TO THE
COMMISSIONER’S RESPONSE REGARDING THE BURDEN OF
PROOF AND RECORD UPON WHICH THE DECISION WILL BE BASED**

Pursuant to Section 1365 of the Uncontrolled Hazardous Substances Site Law, 38 M.R.S.A. § 1365 (“UHSSL”), the Commissioner has the initial burden of going forward to prove the basis for and necessity of each and every component of its November 24, 2008 order (the “Order”) and that proof must be based upon (i.e., is limited to) the information that was in existence at the time the order was issued. In its Response, the Department asserts that this logical straight-forward reading of the statute is somehow a nefarious attempt by Mallinckrodt to alter the parties’ burdens and the record upon which the Board should render its decision.¹ If anything, the Department is concerned – as it should be – by the fact that before the Order was issued, the Department staff did not evaluate the remedial options based upon the 11 RCRA criteria and conclude that the remedy required by the Order was in fact necessary. This explains

¹ See Commissioner’s Response at 3 (calling Mallinckrodt’s position a “transparent and baseless strategic maneuver”); *id* at 1 (stating that “Mallinckrodt attempts to (1) artificially raise the burden of proof”); *id* at fn 1 (stating that “Mallinckrodt has the temerity to argue that the Commissioner’s evidence is ‘limited’”); *id* at fn 5 (characterizing Mallinckrodt’s position as trying to “hedge its bet.”)

why the Department fought the application of the 11 RCRA criteria (as a legal matter) to evaluate the remedy required by the Order (even though it referenced such criteria in its 2002 and 2008 Basis Statements) and why it now opposes a reading of the statute that requires the Department to prove the basis for its Order using information that existed and that the Department evaluated before issuing the Order. The Board should reject the Department's position and follow the plain language of the UHSSL.

I. The Department's Response Fails to Articulate its Burden and Incorrectly Asserts That Mallinckrodt has the Initial Burden of Persuasion Under the UHSSL

The Department acknowledges that it has the initial burden of production in this case, but then refuses any attempts to define what that burden is in this case.² In fact, in its Response, the Department objects to Mallinckrodt's claim that it must prove "each and every component" of its Order. *See* Response at 2 (claiming that using the word "component" will lead to confusion). It is clear that under the UHSSL the Department has the burden to prove the basis for the entire Order not just a certain section of that Order as the Department appears to contend. *See* 38 M.R.S.A. § 1365 ("the commissioner shall first establish the basis for the order").

Furthermore, the Department incorrectly asserts that Mallinckrodt has the initial burden of persuasion because it is the appellant in this case. Although proceedings under Section 1365(4) are in the "nature of an appeal," the hearings are not purely appeals.³ The Board has already decided that hearings under Section 1365(4) (such as this proceeding) are adjudicatory proceedings. In an adjudicatory proceeding under the UHSSL, the Department is the prosecutor

² The Department objects to the assertion that it must prove the basis for the entire Order. *See* Commissioner's Response at 2. Department, however, fails to articulate what it must prove. Instead, the Department simply states, "[t]he Board will hear evidence from witnesses on both sides and arrive at a conclusion. There is no precise road map for how the Board will make its decision, just as a court must apply statutory language to facts." *Id.*

³ Moreover, even if proceedings under the UHSSL were purely appeals and not adjudicatory proceedings, the Department incorrectly concludes that the burden of persuasion in all appeals is on the appellants. In fact, burdens vary by statute, and as already pointed out the UHSSL places the initial burden on the Department to prove the basis for its Order.

and has the burden of proving the “basis” for its Order.⁴ Moreover, because the Department’s authority to issue an order under Section 1365(1)(B) is limited to actions that are “necessary to terminate or mitigate” a danger or likelihood of danger, the Department has the burden of persuading the Board that there is an adequate basis for its Order and that it is necessary under the UHSSL.

II. The Department Must Prove the Basis for its Order Based Upon Information That was in Existence and Considered by the Department at or Before the Time the Department Issued the Order.

In support of its argument that the Board should allow the Department to present information that was created or obtained *after* issuance of its Order – to prove the *basis* for its Order, the Department compares an adjudicatory proceeding under Section 1365(4) of the UHSSL to the ability to supplement a record in a licensing proceeding under 38 M.R.S. § 341-D(4)(A). These two statutory schemes establish very different proceedings and contain very different statutory language. They are not comparable in this context. For example, Section 341-D(4)(A) does not require the Department to prove the basis for its decision (as is required by Section 1365(4) of the UHSSL) and, unlike the UHSSL, does not specify any burdens of proof.

The Department’s argument that the Board cannot limit its consideration of evidence to information that was in existence or considered by the Department before the Order was issued, because the parties will present testimonial evidence at the hearing, should also be rejected. It is obvious that testimonial evidence will be presented to the Board regarding the basis for the Order at the hearing, which testimony necessarily post-dates the issuance of the Order. The Board could, however, easily determine whether information presented by the Department witnesses

⁴ Basis is defined as “something on which something else is established or based” Merriam-Webster’s Collegiate Dictionary (11th ed.2003) at 102.

was in existence before the Order was issued and whether it was in fact considered by the Department before the issuance of the Order.⁵

Furthermore, it is not unfair, as the Department contends, to require the Department to meet its burden under the statute by using information that existed and had been considered by the Department at the time the Order was issued. The Department has had several years to gather and analyze information before issuing the Order. In contrast, the hearing before the Board is Mallinckrodt's first opportunity to present information in response to the Department's Order. Therefore, it is fair to require the Department to meet its initial burden using information it considered before issuing the Order, and then (assuming the Department has met its burden) shift the burden to Mallinckrodt to show, based upon a preponderance of all the evidence, that the Order should be modified or revoked.

CONCLUSION


The Commissioner has the initial burden of proof and persuasion to prove the basis for and necessity of its Order. The evidence that the Board can consider to determine whether the Department had an adequate basis for issuing the Order is that evidence before the Commissioner when he signed the Order. However, the ultimate "record" for purposes of the Board's overall decision regarding whether to modify or rescind the Order

⁵ Moreover, Mallinckrodt can bring to the Board's attention information which post-dated the issuance of the Order and should not consider in determining whether the Department has met its burden under the UHSSL.

(including the remedy and all related requirements) is all of the evidence presented to the Board during the course of the proceedings.

Dated at Portland, Maine this 25th day of September, 2009.

Respectfully submitted,



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